

Congress of the United States  
Washington, DC 20510

May 10, 2021

Judge Merrick B. Garland  
Attorney General  
Department of Justice  
950 Pennsylvania Avenue NW  
Washington, D.C. 20530

Dear Attorney General Garland,

Congratulations on your confirmation. We look forward to working with you to advance, as you put it at your confirmation hearing, the Justice Department’s “commitment to serve the cause of justice and protect the safety of our communities.” In hopes of beginning that work, we write to you today to follow up on the conversations that took place during your confirmation regarding President Biden’s pledge to “strategically support ongoing plaintiff-driven climate litigation against polluters.”

Several climate lawsuits have been filed over the past several years seeking justice from fossil fuel companies who engaged in decades of deception regarding climate change. In these cases, including those filed by five state Attorneys General, the Attorney General of the District of Columbia, as well as 20 cities and counties, governments are seeking to abate the harm this deception has caused.

During the Trump administration, the Department of Justice (DOJ) filed amicus briefs in support of fossil fuel companies in many cases in federal court (including the Supreme Court) and state court. These briefs take procedural and substantive positions that, in our view, substantially mischaracterize the plaintiffs’ complaints. In part for that reason, many of the positions in these briefs have been rejected repeatedly in court. More specifically, the DOJ has:

- supported an overly expansive interpretation of 28 U.S.C. § 1447(d) by arguing that, a federal appeals court may review all issues raised in a removal notice during an appeal of an order for remand to state court, not just those related to the exceptions for federal officer or civil rights jurisdiction—even when the court determines that defendants’ assertions of federal officer or civil rights jurisdiction are meritless;
- claimed that federal courts must exercise exclusive jurisdiction over these climate deception lawsuits, and thus that state courts are barred from exercising jurisdiction, because the underlying claims are inherently and essentially federal in nature—despite the fact that plaintiffs exclusively originally allege violations of state common law and state statutes;

- argued that these state law claims in the climate deception lawsuits have been displaced and preempted by the Clean Air Act as well as the Foreign Commerce Clause and foreign affairs authorities of the Constitution, even though these cases seek remedies for purely intrastate harm arising from violations of state laws, and therefore are not preempted by the Clean Air Act or the Constitution;
- mischaracterized the complaints, asserting that the plaintiffs are raising claims regarding regulation of interstate or international emissions and claims that are inherently disputes about interstate or international pollution, despite clear and careful language specifically targeting only accountability for damages to the plaintiff states or localities caused by decades of deception regarding climate change; and
- embraced the idea that these lawsuits violate constitutional separation of powers provisions and are non-justiciable, despite the fact that the resolution of fraud claims (no matter the scale of the conduct or damages) is clearly neither a violation of the separation of powers nor non-justiciable.

We request that you promptly review the briefs previously filed in these cases and reassess what the Department's positions should be in future briefs, in order to ensure they are consistent with the Department's commitment to environmental justice. This effort is urgently needed, as the fossil fuel companies in these cases continue to cite DOJ briefs in their proceedings. Multiple cases have upcoming deadlines where fossil fuel companies are likely to again cite the Department's current positions as articulated in its previously filed briefs. The fossil fuel industry will continue to undermine justice by using these briefs until the Department reverses the positions it has taken in those lawsuits.

We hope that you will keep President Biden's commitment as well as your own commitment to environmental justice in mind as you review the Department's positions and participation in each case, and support efforts to hold polluters accountable for their deception.

Finally, we would also like to reiterate a previous request that the Department consider launching its own investigation into the same deceptive practices that lie at the heart of these lawsuits.

Sincerely,

/s/ Richard Blumenthal  
United States Senator

/s/ Sheldon Whitehouse  
United States Senator

/s/ Edward Markey  
United States Senator

/s/ Mazie K. Hirono  
United States Senator

/s/ Benjamin L. Cardin  
United States Senator

/s/ Chris Van Hollen  
United States Senator

/s/ Alex Padilla  
United States Senator

/s/ Elizabeth Warren  
United States Senator

/s/ Brian Schatz  
United States Senator